# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

## SPECIAL CIVIL APPLICATION No. 20819 of 2006

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE D.A.MEHTA**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**VISHAL NILESH MANDLEWALA - Petitioner(s)**
**Versus**
**JUSTICE R.J. SHAH ( RETD.) & 1 - Respondent(s)**

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**Appearance :**
MR GM JOSHI for Petitioner(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 1 - 2.
TANNA ASSOCIATES for Respondent(s) : 1,
MR KB PUJARA for Respondent(s) : 2,

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**CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA**

**Date : 10/11/2006**

**ORAL JUDGMENT**

1. This petition has been preferred to challenge the order made by respondent No.1-committee refusing to grant approval to the admission of the petitioner given by respondent No.2-college, with a further prayer to command the respondent No.1-Admission Committee to approve the admission of the petitioner in the category of Non Resident Indians (NRIs) at Surat Municipal Institute of Medical Education and Research, Surat, (Institute) respondent No.2 herein.

2. The facts stated in paragraph No.2 of the petition read as under:-

> *"The petitioner states and submits the petitioner is the son of Nilesh Vinodchandra Mandlewala. However, Kirit V.Mandlewala is appointed as his guardian by the county Court of Marion County Superior Court, in the state of Indiana, United State of America. Copy of the letter of guardianship issued by the County Court is produced herewith and marked as Annexure-A to this petition".*

It is the say of the petitioner that after having cleared the 12th Standard Examination in Science Stream conducted by Gujarat Higher Secondary Education Board for academic year 2005-2006, the petitioner became entitled to seek admission in Medical Course in the category earmarked for NRIs. The basis for making the claim is, according to the petitioner, that the case of the petitioner is governed by regulation No.1 and 2 of the Regulations framed by respondent No.1-committee. That the petitioner having applied was called by respondent No.1 to remain present on 27th July, 2006 for the purpose of scrutiny of his status, namely, whether the petitioner is or is not an NRI. That the petitioner duly appeared for scrutiny of the form filled-up by the petitioner. The Income-tax Officer endorsed the form to the effect that Guardian of the petitioner can be considered to be an NRI. However, in so far as, the other endorsement, which was required to be made by Social Justice Department of the State Of Gujarat, the endorsement was that on verification, the documents were not as per the norms and the petitioner was directed to present the document issued by Marion County Superior Court after the same was countersigned by an Indian Court.

3. Thereafter, it is the case of the petitioner that on 13.08.2006, respondent No.2-Institute intimated that as the process of verification was completed, the petitioner was provisionally admitted in NRI quota, subject to final approval by Competent Authority. That as directed by respondent No.2-Institute Tution Fees to the extent of American $13,000/- were duly paid by petitioner on 03.09.2006. However, respondent No.1-Committee vide communication dated 27.09.2006 has conveyed to respondent No.2 that out of list of 4 students forwarded by respondent No.2-Institute, admission is permitted only qua 2 students and the name of the petitioner does not figure therein. Accordingly, vide communication dated 28.09.2006, the petitioner was informed by respondent No.2-Institute that the provisional admission of the petitioner was cancelled.

4. Mr.G.M.Joshi, learned advocate appearing on behalf of the petitioner has assailed the aforesaid action of the respondent authorities on the ground that regulation No.4 of the Regulations only requires verification of the documents relating to NRI wards by an officer from the Social Justice Department and such document have to be executed in a Court of law. That the said regulation does not stipulate the

execution of a document before an Indian Court, nor does it require any countersignature by an Indian Court, and therefore, right at the stage of scrutiny, the petitioner was called upon to undertake an exercise, which was neither warranted by the regulation nor by any other law. However, to satisfy the authorities, the petitioner obtained an endorsement from the District Court, Surat and presented the document and that is why respondent No.2-Institute granted provisional admission. That the petitioner having done everything that is required by the Regulations for securing admission in NRI quota, in absence of any other requirement, it was not open to respondent authorities to cancel the provisional admission, but it was incumbent upon the respondents to confirm the provisional admission in favour of the petitioner.

5. A further plea was raised that the petitioner was neither given an opportunity of hearing, as no notice has been issued to the petitioner, nor was communicated the decision by respondent No.1-committee, but the petitioner received the communication only from respondent No.2-Institute. That even if the communication dated 27.09.2006, issued by respondent No.1-committee is perused, in so far as respondent No.2- Institute is concerned, except for upholding

the provisional admission of 2 other students in NRI quota, no reasons are assigned whatsoever for rejecting the application of the petitioner. He, therefore, assailed the action of respondent No.1-committee on the ground that there was violation of principles of natural justice, there was no order and the law required, that a quasi judicial authority like respondent No.1 should not only pass an order, but the order must be a speaking one. He, therefore, urged that the action was required to be struck down and the respondents are required to be directed to admit the petitioner (in NRI quota) to the Medical Course run by the respondent No.2- Institute.

6. In support of the aforesaid submissions, he has invited attention to the Regulations framed by respondent No.1- committee to submit that in so far as Regulations are concerned once the requisite conditions are shown to have been satisfied respondent No.1 did not have any right to refuse admission. He has commented upon regulation No.1 and 2, 3, 4 and 6 to submit that even going by the said regulations, the petitioner's case is fairly covered by the said regulations and the petitioner has fulfilled all the conditions stipulated by the regulations.

7. Mr.K.B.Pujara, learned advocate appearing on behalf of the respondent No.2-Institute invited attention to paragraph No. 14 of the Affidavit-in-Reply to submit that respondent No.2-Institute does not favour one or the other student, nor does it oppose any student as such, but the only anxiety that respondent No.2--Institute has is that no seats may be left vacant as it would result in a no win situation for all sides.

8. Mr.B.P.Tanna, learned senior advocate appearing on behalf of respondent No.1-committee has submitted that the entire issue has to be approached in light of the decision of Apex Court in the case of P.A.Inamdar and others V/s.State of Maharashtra and others, (2005) 6 SCC 537, with special reference to paragraph No. 131 of the said judgment which lays down the principles, which govern the allotment of NRI seats. That on plain reading of the said paragraph, according to the learned counsel, there can be no difficulty in a case where both the parents and children are NRIs, but otherwise, in any other case, the admission has to be governed on the basis of the principles enunciated by the Apex Court and the Regulations framed by the committee. That in case, the Regulations deviate from the principles enunciated by the

Apex Court, the principles as laid down have to be given precedence and adherence to Regulations which are contrary to such principles cannot be permitted. That on going through the order/communication dated 27.09.2006, it becomes clear that the respondent No.1-committee had applied its mind to the record before it and this became clear from the remarks made in relation to various institutions, which have been referred to, in the said order. He also invited attention to the statement made at the end of the order which is applicable to all the institutions and was common in nature. That the institutions/colleges were informed that only those students whose admissions have been approved by the committee should be permitted to pay up the fees; and therefore, the petitioner cannot be heard to say that merely because the petitioner had paid up the fees, the authority could not refuse or reject the provisional admission. Apart from the aforesaid contention, it was submitted that the petitioner is a resident of Surat with a permanent address in Surat and therefore, cannot claim that he is an NRI, only on the basis of a Guardianship document which cannot be equated with a document of adoption. According to the learned counsel, the petitioner had failed to establish that either the petitioner or the so called guardian was an NRI within the meaning of the

term as per definition under the Income Tax Act, 1961. That a citizen of another country, like USA in the present case, cannot claim to be an NRI merely on the basis of such citizenship but has to satisfy the requirement stipulated in the Income Tax Act. He, therefore, urged that the petition was required to be rejected without any interference.

9. It is necessary to record that in relation to preliminary contention raised by Mr.Joshi that respondent No.1-committee had not tendered any affidavit in reply Mr.Tanna had stated that the same had not been filed only because the committee did not want to be charged with the allegation that the committee was presenting reasons which did not exist in its order. That in so far as grievance regarding non-hearing the petitioner was concerned, the committee was ready to give a post decisional hearing, and alternatively was ready to hear the petitioner, even if the impugned order was quashed and set aside.

10. In rejoinder, Mr.Joshi, prayed that leave to tender additional affidavit may be granted by inviting attention to the admission list of students admitted in NHL Municipal College, Ahmedabad to contend that the approach of respondent No1-

committee was neither consistent nor in accordance with norms. As the stage at which the affidavit was sought to be presented was belated, bearing in mind that this matter is being heard since yesterday, the Court has refused permission and not taken the same on record. Mr.Joshi, therefore, submitted that regardless of the same he was requesting the Court to call upon respondent No.1-committee to produce it's record and/or basis for admission granted to other students in NRI quota.

11. The aforesaid submission does not deserve consideration for the simple reason that this submission does not form part of the pleadings and as recorded hereinbefore, at the stage of rejoinder, it is not possible to permit the petitioner to develop a new case. Apart from that, the petitioner has to succeed or fail on the facts of the case pleaded by the petitioner himself and cannot seek any relief on the basis of so called case of omission or commission of the other side qua third party, without there being any prima-facie evidence or pleadings to substantiate the averments that the case of the petitioner is identical with those third parties, namely in absence of any foundational facts.

12. Coming to the principal issue, it is necessary to briefly recapitulate what the Apex Court has laid down in the case of P.A.Inamdar _(supra). The Supreme Court states that ;

> *Here itself we are inclined to deal with the question as to seats allocated for Non-Resident Indians ('NRI', for short) or NRI seats. It is common knowledge that some of the institutions grant admissions to certain number of students under such quota by charging a higher amount of fee. In fact, the term 'NRI' in relation to admissions is a misnomer. By and large, we have noticed in cases after cases coming to this Court, neither the students who get admissions under this category nor their parents are NRIs. In effect and reality, under this category, less meritorious students, but who can afford to bring more money, get admission. During the course of hearing, it was pointed out that a limited number of such seats should be made available as the money brought by such students admitted against NRI quota enables the educational institutions to strengthen its level of education and also to enlarge its educational activities. It was also pointed out that people of*

*Indian origin, who have migrated to other countries, have a desire to bring back their children to their own country as they not only get education but also get reunited with Indian cultural ethos by virtue of being here. They also wish the money which they would be spending elsewhere on education of their children should rather reach their own motherland. A limited reservation of such seats, not exceeding 15%, in our opinion, may be made available to NRIs depending on the discretion of the management subject to two conditions. First, such seats should be utilized bona fide by the NRIs only and for their children or wards. Secondly, within this quota, the merit should not be given a complete go-by. The amount of money, in whatever form collected from such NRIs, should be utilized for benefiting students such as from economically weaker sections of the society, whom, on well defined criteria, the educational institution may admit on subsidized payment of their fee. To prevent misutilisation of such quota or any malpractice referable to NRI quota seats, suitable legislation or*

*regulation needs to be framed. So long as the State does not do it, it will be for the Committees constituted pursuant to Islamic Academy's direction to regulate.*

13. Pursuant to the aforesaid observations, the State has constituted respondent No.1-committee which has framed the Regulations styled as “Regulations and Admission Procedure to carry out admission under NRI quota by the unaided professional institutions in the State of Gujarat”.

14. Regulation No.1 stipulates that the definition of NRI shall be as defined under the Income Tax Act, 1961. Regulation No.3 states that an officer from the Income Tax Department shall verify the documents at the time of admission with regard to status of NRI. Therefore, regulation No.1 prescribes the qualification as to who can be termed to be an NRI, namely, a person who satisfies the tests laid down by relevant provisions of the Income Tax Act. This regulation is, therefore, substantive regulation. However, when one reads regulation No.3, it only lays down a procedure and therefore, to treat an endorsement by an officer to be final, cannot be permitted. It goes without saying that even if the

concerned officer might have made an endorsement, when the matter is brought before the Court, the petitioner cannot claim that it is not open to the Court to satisfy itself whether the statutory requirement stands fulfilled or not. The petitioner is, albeit, entitled to claim that prima-facie there should be a presumption in favour of the petitioner in such circumstances. As the facts reveal, there is a factual error committed by the Income Tax Officer while recording the endorsement. It is pertinent to note that in financial year 2005-2006 Mr.Kirit Mandlewala had stayed in India only for 26 days while the endorsement records that the stay was for 75 days. Mr.Joshi does not dispute this error.

15. Reverting back to the Regulations, regulation No.2 reads as under:-

> *2. Wards of NRI shall be a person adopted by a guardian as per definition of NRI under Income Tax Act, 1961. Such a guardian should be testamentary, certificated, natural or even de-facto.*

16. On a plain reading, it becomes apparent that the same is not happily drafted. However, without entering into the analysis of the same, suffice it to state that the said

regulation cannot be read so as to laying down a position contrary to the statutory law.

17. Under the Indian Majority Act, 1875, Section 3 provides for age of majority of persons domiciled in India. The provision stipulates that every minor of whose person or property, a guardian has been appointed or declared by any Court of Justice before such minor has attained the age of eighteen years, shall, notwithstanding anything contained in any other enactment, be deemed to have attained majority only on completion of age of twenty-one years and not before. The proviso states that every other person domiciled in India shall be deemed to have attained majority when the person completes the age of eighteen years and not before. This provision assumes importance in light of the definition of the term “minor” under the Guardians and Wards Act, 1890.

18. Under The Guardians and Wards Act, 1890 (Guardians Act) the following definitions of the terms “Minor”, “Guardian” and “Ward” appear” in Section 4(1), 4(2) and 4(3) respectively :

> *4. Definitions – In this Act, unless there is something repugnant in the subject or context,-*
>
> *(1)“minor” means a person who, under the*

*provisions of the Indian Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority;*

*(2)"guardian" means a person having the care of the person of a minor or of his property or of both his person and property;*

*(3)"ward" means a minor for whose person or property or both there is a guardian;*

19. Section 19 of the Guardians Act lays down the circumstances in which the authority of the Court to appoint or declare as guardian of a minor is circumscribed. The said provisions reads as under:-

*19. Guardian not to be appointed by the Court in certain cases:- Nothing in this Chapter shall authorize the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards or to appoint or declare a guardian of the person-*

*(a) of a minor who is married female and whose husband is not, in the opinion of Court, unfit to be guardian of her person; or*

*(b) [***]of a minor who father is living and is not in the opinion of the Court, unfit to be guardian of the person of the minor; or*

*(c ) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.*

20. The Hindu Minority and Guardianship Act, 1956 (The Hindu Minority Act) states vide Section 2 that the provisions of Hindu Minority Act shall be in addition to, and not, save as hereinafter as expressly as provided, in derogation of the Guardians Act. Section 4 of the Hindu Minority Act defines the terms “Minor”, “Guardian” and “Natural Guardian” as under:--

*4. Definitions – In this Act-*

*(a) “minor” means a person who has not completed the age of eighteen years;*

*(b) “guardian” means a person having the care of the person of a minor or of his property or of both his person and property, and includes-*

*(i) a natural guardian,*

*(ii)a guardian appointed by the will of the minor's father or mother,*

*(iii)a guardian appointed or declared by a court, and*

*(iv)a person empowered to act as such by or under any enactment relating to any court of wards;*

*(C ) “natural guardian” means any of the guardians mentioned in section 6.*

21. As to who can be an natural guardian of a Hindu Minor has been provided in Section 6 of the Hindu Minority Act.

*6. Natural guardians of a Hindu minor.- The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are -*

*(a) in the case of a boy or an unmarried girl-the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother,*

*(b) in case of an illegitimate boy or an illegitimate unmarried girl-the mother, and after her, the father;*

*(c ) in the case of a married girl- the husband:*

*Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section-*

*(a) if he has ceased to be Hindu, or*

*(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).*

*Explanation – In this section, the expression "father" and "mother" do not include a step-father and a step-mother.*

22. The position in law, therefore, is that in case of a minor whose father is living and is otherwise not unfit to be a guardian, in the opinion of the Court, of the person of a minor, no Court shall appoint any other person as Guardian in so far as the person of a minor is concerned. For the present, it is

not necessary to deal with the situation relatable to appointment of guardian qua the property of the minor. The term “ward” has been defined to mean a minor for whose person or property or both there is a guardian. This is the basic scheme of the Guardians Act. The Hindu Minority Act is supplemental to the Guardians Act, and even under the said act, the term “Guardian” has been defined to mean, in the circumstances, a natural guardian, followed by a guardian appointed by will, a guardian appointed or declared by a Court, and a person empowered to act as such or by any other enactment relating to Court of wards. The term “natural guardian” envisages only those persons who have been specified in Section 6 of the Hindu Minority Act which also stipulates the order of priority.

23. Thus on a conjoint reading of the scheme under the Guardians Act and the scheme under the Hindu Minority Act (bearing in mind that the latter Act is supplemental to the Act of 1890) the position in law is that in case of a Hindu minor during existence of a natural guardian the Court is not authorized to appoint any other person as a Guardian and if any such order is made the same would be bad in law. The only exception being, where the Court finds that the natural

guardian is not fit to continue as a guardian of the minor.

24. The father of a child is the first person to be a natural guardian followed by the mother. Only in absence of the natural parents can the question arise as to appointment of any other person, including a relative, as a guardian. Once it is found that a natural guardian is alive, and is otherwise not unfit legally to act as a guardian, no Court can exercise power to appoint any other person as a guardian. If a Court established in Indian is not so empowered no foreign Court can be stated to have any such power.

25. If one applies the aforesaid settled position in law to the facts available on record it becomes apparent that the petitioner cannot claim the benefit of being an NRI, or being a Ward of an NRI. The petitioner is a major, as accepted by the learned advocate for the petitioner. In the circumstances, there can be no question of appointment of any person as a guardian of a major. Therefore, the document titled as LETTER OF GUARDIANSHIP (Anenxure-A) issued on 23rd June, 2006 by the Marion County Superior Court, in the State of Indiana, United States of America certifying Shri Kirit V.Mandlewala to be guardian of the estate of the petitioner

cannot have any legal status nor can it be pressed into service by the petitioner to claim the benefit of admission in the NRI quota.

26. In the circumstances, once the petitioner does not fulfill the basic requirement of being a ward of the guardian, the petitioner himself will have to satisfy that he fulfills the requirement of provisions of the Income Tax Act, 1961 to be classified as an NRI. That is not even the case of the petitioner. Thus, in any view of the matter, the petitioner does not satisfy the legal requirement of being an NRI and cannot claim any right to be admitted in the NRI quota.

27. In so far as the contention based on the absence of opportunity and the order not being a reasoned order is concerned, it is necessary to record that at the outset the learned advocate for the petitioner had been asked as to whether the petitioner would like to avail of such an opportunity. But, under instructions, the learned advocate has informed that the petitioner desires to proceed with the matter and hence, it is not necessary to deal with the said contention in light of what is stated hereinbefore.

28. The petition in the circumstances does not merit acceptance. The same is rejected accordingly. Notice discharged. Interim -relief stands vacated.

29. At this stage, the learned advocate for the petitioner states that the petitioner has been pursuing his studies and hence, the interim relief may be extended for some time. In light of the facts, which have come on record, the request is rejected.

Sd/-

**(D.A.MEHTA, J.)**

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